IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

THURSDAY, THE SEVENTH DAY OF JULY
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE B. SUDERSHAN REDDY

and
THE HON'BLE MR JUSTICE K.C. BHANU

WRIT APPEAL NO : 856 of 2004

(Writ Appeal under Clause 15 of the Letters Patent against the Order dated 05-08-2003 in W.P No 16886 OF 1987 on the file of the High Court.)

Between:

1 The A.P. State Electricity Board, rep by its Secretary, Vidyut Soudha, Samajiguda, Hyderabad.
2 The Chief Engineer, Electricity (Opeation), PSEB, Vidyut Soudha, Somajiguda, Hyderabad.
3 The Superintending Engineer, Opeation Circle, AP S.E. Board Anantapur.
4 The Divisional Electrical Engineer(Operation), APSEB, Kurnool.
5 The Senior Accounts Officer, Operation Circle, PSE Board, Anantapur.

..... APPELLANT(S)

AND

Sree Rayalayaseema Alklies and Allied Chemicals Ltd. Having its Regd. Office at TGL Buildings, TGL Road,
Adoni, Kurnool District, rep by its Managing Director,
Shri T.G. Venkatesh

.....RESPONDENT

Counsel for the Appellant:SMT.M.VINOBHA DEVI

Counsel for the Respondent No.: MR.D.V.NAGARJUNA BABU

The Court made the following :

The Hon'ble Sri Justice B. Sudershan Reddy

a n d

The Hon'ble Sri Justice K.C. Bhanu

WRIT APPEAL No. 856 OF 2004

O R D E R: (per Sri Justice K.C. Bhanu)

This writ appeal is filed by the respondents in W.P. 16886 of 1987 against the judgment of the learned single Judge in W.P. 16886 of 1987 dated 5.8.2003.

The respondent herein filed the said writ petition stating that it secured industry licence No. CIL:91(86) dated 3.3.1986 for setting up of chemical industry at Gondiparla village of Kurnool District for the purpose of manufacturing of caustic soda, chlorine, hydrochloric acid etc. The petitioner applied to the 1st respondent for supply of high tension power for a demand of 20 MVA for the purpose of industrial unit in 1981 itself. The 2nd respondent in the writ petition, who is the 2nd appellant herein, by his letter dated 11.5.1983 directed the petitioner to deposit a sum of Rs.39.83 lakhs towards voluntary loan contribution, which is refundable. Thereafter, the 1st respondent-Board changed its policy and introduced the scheme of collecting service line charges in the place of voluntary loan contribution. The petitioner requested the respondent-Board to treat its service under the old scheme of voluntary loan contribution as it had applied for supply of power long back and collect the proportionate VLC for 10 MVA demand. But the respondent-Board negatived the petitioner's

request and directed the petitioner to pay a sum of Rs.18,00,000/- in six instalments pending sanction of the estimate. The supply was to be released on payment of the first instalment. The bank guarantee was also furnished for the balance. A High Tension Agreement dated 26.6.1987 was duly entered by the parties for supply of H.T. power. After completing the formalities, the petitioner requested the officials of the respondent-Board for release of supply. The 4th respondent directed the petitioner to pay a sum of Rs.87,00,000/- towards security deposit and Rs.55,000/- towards service connection charges. As per the request of the petitioner the respondent-Board granted 12 monthly equal instalments. Accordingly the petitioner paid a sum of Rs.7,25,000- towards first E.M.I. and Rs.55,000/- towards service connection chages on 26.9.1987 and requested the respondent-Board to release the supply. The regular supply was not released to the petitioner on the ground that the proposal to release supply was sent to the respondent-Board for approval. Therefore, the petitioner filed W.P. 15257 of 1987 for release of supply. This court after hearing both sides directed the Board to release the supply. Accordingly supply was released on 20.10.1987. Thereafter a bill dated 20.10.1987 was issued for Rs.3,27,008-25ps. under H.T. category-III. According to the petitioner, the bill would be only Rs.38,802-57ps. if the H.T. category-I tariff is applied. The letter of the Board gave an option to the petitioner to choose H.T. category-I tariff and an agreement was duly executed and sent. The Board accepted the same. It is further contended that there are no norms for identifying the power intensive and the Board evaded defining the power intensive industry. No criterion was prescribed for selecting consumers. For the first time the Board in its proceedings in

B.P.Ms.No. 671 dated 10.6.1987 made a reference to Category III under the caption “power intensive industries’. Therefore, it is not open to the Board to notify the tariff and make it applicable to consumers of its choice. The Board cannot compulsorily make applicable the tariff choosing some individual consumers. Therefore, the said act is illegal. Hence the writ petition to direct the respondents to bill the petitioner for the power supplied according to H.T. Category-I tariff giving the 25% rebate granted to new industries.

On behalf of the respondents a counter affidavit was filed stating that voluntary loan contribution scheme was abolished in 1985 and the demand of the Board for payment of service line charges is in order. The tariff notification issued in BPMS No. 671 dated 10.6.1987 effective from 15.7.1987 contains the names of eight consumers and the consumers who availed power supply on or after 15.7.1987 and manufacture caustic soda, ferro silicon, sodium metal, ferro chrome & ferro manganese, silicon carbine, calcium carbide, calcium carbide etc. have to be classified under HT Category-III and therefore billing the same under HT category-III is justified. The option was not available in pursuance of the notification issued by the Board dated 10.6.1987. The consumer is liable to be classified under HT category-III and the bills are issued as per tariff classification under HT category-III as notified in BPMS No. 671 dated 10.6.1987 as amended in BPMS No. 298 dated 30.3.1988. Therefore, the respondent-Board prayed to dismiss the writ petition.

The petitioner filed a detailed reply affidavit stating that the petitioner started availing of power supply by the petitioner right from 1987. The commercial production of the petitioner started from

1.12.1987 and therefore the petitioner is entitled to avail rebate of 25% for a period of 3 years from 1.12.1987. As the petitioner opted for H.T. category-I with rebate of 25% and that option has been accepted, the petitioner is entitled to invoke the principle of promissory estoppel. Therefore, the petitioner is entitled for 25% under HT category-I.

Basing on the material available on record, the learned single Judge directed the respondent-Board to extend 25% rebate on the actual consumption charges levied and collected for the first three years and that the petitioner shall be treated as Category-III industry from 30.3.1988 i.e. the date of issuance of BPMS No. 298 and accordingly allowed the writ petition in part. Aggrieved by the same, the present writ appeal is filed by the respondents in the writ petition.

Learned senior counsel Mr. N. Subba Reddy contended that the Board has plenary power to change the category notwithstanding any law or agreement. The power of the Board to issue proceedings is legislative in character. The board has issued proceedings withdrawing the concession under H.T. Category to all the industries. The writ petitioner has no enforceable right to question the categorization. The Board's proceedings in BPMS No. 671 dated 10.6.1987 were upheld by this court and the rebate of 25% depends upon categorization and, therefore, he prays to set aside the order under appeal.

On the other hand, the learned counsel for the respondent contends that irrespective of the category an industry is eligible for 25% rebate unless such an industry falls under the ineligible category and treating the respondent-industry as belonging to category-III is

contrary to the agreement dated 26.6.1987 and the appellant-Board is bound by the terms and conditions of the agreement and therefore the appellants are estopped from changing the power tariff.

Basing on the rival contentions raised by both the parties, the following points were framed by the learned single Judge:

> "1. Whether the respondent-Corporation has the power to change the category of the unit of the petitioner from Category-I to Category-III and collect electricity charges at a higher rate?
>
> 2. Whether the petitioner can be denied the incentive by way of 25 per cent rebate on consumption charges for a period of three years from the date of initial production, on the ground that it was categorized under Category-III?

It is not in dispute that the respondent started availing power supply from October 1987 and also that the respondent-industry commenced commercial production from 1.12.1987. A High Tension Agreement was entered between the respondent and the appellant-Board on 26.6.1987. It is not in dispute that as per G.O.Ms.No. 654 dated 13.9.1976 all new industrial units which have gone into commercial production on or after 1.1.1976 are entitled to have 25% concession in power tariff for initial period of three years. In furtherance of the said G.O., the Board's proceedings dated 10.8.1976 in BPMS No. 691 were issued for implementation. In pursuance of the G.O.Ms.No. 38 dated 20.1.1977 all the industries which went into commercial production on or after 20.10.1975 became eligible to claim 25% rebate. The Board issued proceedings in BPMS No. 311 dated 6.4.1977 implementing the said decision of

the Government. As rightly contended by the learned senior counsel Mr. N. Subba Reddy, the tariff fixation by the appellant-Board is legislative in character. There is no dispute about that fact because a Full Bench of this court in ***VBC Ferro Alloys Ltd. v. A.P.S.E.B.*** held that the tariff fixation can be declared unconstitutional only if it is patently arbitrary, irrational, discriminatory or demonstrably irrelevant. The tariff fixation by the Board is legislative in character. In the aforementioned decision, the Board's proceedings BPMS No. 298 dated 30.3.1988 is held to be prospective. The change of category and also the validity of BPMS No. 298 dated 30.3.1988 and BPMS No. 671 dated 10.6.1987 came up for consideration before the Full Bench in the aforementioned decision, wherein it is held:

> "What applies to BPMS No. 671 is equally applicable to BPMS No. 298 by which item No.9 in the list of H.T. Category-III power intensive tariff consumers is added. The reasons for which BPMs.No. 697 dated 10.6.1987 is upheld by this court would equally applicable for upholding the B.P.Ms.No.298 dated 30.3.1988. By B.P.Ms.No.298 some other consumers manufacturing Caustic Soda, Ferro Silicon etc., are added to the list of H.T. Category-III power intensive consumers. Therefore, we hold that the B.P.Ms.No.298 dated 30.3.1988 does not suffer from any constitutional infirmity. Likewise, continuing the re-categorization of the petitioner's unit in H.T. Category-III vide B.P.Ms.No.353 also does not suffer from any unconstitutionality".

A Division Bench of this court in ***VBC Ferro Alloys Ltd. v. A.P.S.E.B***. which had fallen for consideration before the Full Bench of

this court in the above decision (referred (1) supra) was already confirmed by the Supreme Court in Petitions for Special Leave to Appeal (Civil) Nos. 4496 of 1993 and 6639 of 1993. Such is the case, classifying the petitioner's unit producing caustic soda under H.T. Category-III as power intensive industry as on the date of commencement of supply i.e. 25.10.1987 is totally justified and BPMs.No.298 dated 30.3.1988 does not suffer from any vice or constitutional infirmity. So also, the re-categorization of the petitioner-respondent's unit in H.T. category-III does not suffer from any vice of unconstitutionality. In our considered opinion, the learned single Judge after elaborate consideration of the matter and the law laid down by this court in the abovementioned Full Bench decision as confirmed by the apex court rightly held that the appellant-Board had power to change the category of the Unit of the respondent herein from Category-I to Category-III and collect electricity charges as per the tariff.

Coming to the other aspect with regard to the incentive of 25% rebate on the consumption charges, learned counsel for the respondent contended that in pursuance of the clause in the H.T. agreement he is liable to pay the amount under category-III. As per H.T. Agreement dated 26.6.1987, the clause which is relevant, reads as follows:

> "From the date this agreement comes into force I/We shall be bound by and shall pay the Board maximum demand charges, energy charges, Surcharges, meter rents and other charges, if any, in accordance with the tariffs applicable and the terms and conditions of supply prescribed by the Board from time to time for the particular class of consumers to which

I/We belong".

This clause is with regard to payment of charges, surcharges etc. It does not deal with directly with regard to availing of 25% rebate. The contention of the learned counsel for the petitioner-respondent herein is that irrespective of category as per the Board's proceedings in B.P.Ms.No. 311 dated 6.4.1977 the petitioner-unit is eligible to claim 25% rebate. He further contended that the Board has no power to amend the list of 65 ineligible industries appended to G.O.Ms.No.224 dated 9.3.1976 and therefore the Board's proceedings B.P.Ms.No.1098 dated 8.12.1987, wherein 7 more industries are added to the list of ineligible industries, is not valid.

In ***M/s. V.K. Ferro Alloys Industries Pvt. Ltd. v. A.P. State Electricity Board***, a Division Bench of this Court held:

> "Therefore we have no hesitation in holding that the Government in exercise of the powers in Section 78A of the Electricity (Supply) Act, 1948, have been taking policy decisions as to the entitlement of the power concession to the industries and issuing orders reckoning the date of extension of concessions as the date on which the industry went into regular production, as such the ineligibility for the industries manufacturing ferro products operates from the date of G.O.Ms.No. 379 dated 27.7.1989 but not from any earlier date".

The Full Bench in ***VBC Ferro Alloys*** case (referred (1) supra) also held that the B.P.Ms.No. 298 dated 30.3.1988 is only prospective in operation but it is not retrospective in nature. As per G.O.Ms.No. 654 Industries dated 13.7.1976, all the new industrial

units which have gone into commercial production on or after 1.1.1976 are entitled to have 25% concession in power tariff for initial period of three years. Implementing the said G.O., the Board issued B.P.Ms.No. 691 dated 10.8.1976. Therefore, the petitioner is eligible to have the permissible incentives by virtue of the Government Orders which were adopted by the appellant-Board. Admittedly the power supply was started to the petitioner's unit from October 1987 and the petitioner started commercial production w.e.f. 1.12.1987 and the same is not disputed by the appellant-Board.

The apex court in ***A.P. State Electricity Board v. M/s. Sarada Ferro Alloys Ltd*** held:

> "Where in exercise of its powers under S. 49 the A.P. State Electricity Board issued order granting rebate of 25% in demand and energy charges for High Tension Industries and it was specifically mentioned therein that the rebate was to be allowed from the date of going into regular production, the doctrine of promissory estoppel cannot be applied when the Board had withdrawn the incentive given previously and the company started its commercial production subsequent to that date. The promise or representation made by the Board if any, was directly linked with the date of commencement of production by the company. In such a case, it cannot be said that as once the company started the process of setting up an industry and had incurred expenditure, the Board was bound to keep its incentive open for the company till it started production. Only those industries were entitled to the benefit of the incentive who fulfilled the requirements during the period the incentive was operative".

In ***Pawn Alloys & Casting Pvt. Ltd. v. U.P.S.E.B.*** the Supreme Court held:

> "Consequently it must be held that relying upon the representations held out by the Board in these earlier notifications assuring grant of incentive rebate of 10% on the total bill of electricity consumption charges these new industries being assured that for three years this concession will be available had burnt their boats and spent large amounts and had established their industries in the area falling in the operative jurisdiction of the Board in the State of U.P".

Therefore, the petitioner is entitled to have the benefit of 25% rebate for a period of three years from the date of commercial production as was originally promised at the time of inception of the industry. Hereafter, re-categorisation of this 25% rebate as agreed will remain unaffected. On such a re-categorisation, the concession which was given by the Board shall not be defeated or taken away because of subsequent change in the categorization.

In another decision of this court in ***A.P.S.E.B. Vidyut Soudha v. M/s. Uni Metal Alloys Ltd***, it is held:

> "Since the industry was established and commenced its production before the Government took a decision to include it in similar other industries in the list of ineligible industries for 25% rebate of electricity charges, the electricity board cannot stop extending the 25% rebate".

Applying the above principles and also the law laid down by the Supreme Court and the Full Bench and two Division Bench of this Court as referred to above, we have no hesitation in holding that

the respondent-petitioner's unit is entitled for 25% rebate on actual consumption charges levied and collected for the first three years from the date of starting of its commercial production. The order under appeal doe not suffer from any serious and incurable infirmities so as to call for interference by this court. The findings are on the basis of proper appreciation of the material on record and also applying the ratio laid down in the Full Bench decision in ***VBC Ferro Alloys*** case (referred (1) supra) and also the apex court in ***Pavan Alloys*** case (referred (5) supra). There are absolutely no merits in this writ appeal and it is accordingly dismissed. In the circumstances, no order as to costs.

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B. Sudershan Reddy, J.

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K.C. Bhanu, J.

Date: --10—2004.

MVB.

.....REGISTRAR

To

1. **Shri T.G. Venkatesh, Managing Director,**
Sree Rayalayaseema Alklies and Allied Chemicals Ltd. Having its Regd. Office at TGL Buildings, TGL Road,
Adoni, Kurnool District,

2.2 CD copies